STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 10, 2013
v	No. 312874 Kent Circuit Court
DENNIS PATRICK BIRD, JR., Defendant-Appellant.	LC Nos. 11-007338-FC; 11-007445-FC; 11-010105-FC

Before: SAWYER, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

Defendant appeals by right his convictions in LC No. 11-007338-FC of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(b)(ii); in LC No. 11-007445-FC of two counts of first-degree CSC, MCL 750.520b(1)(a) and MCL 750.520b(1)(b)(ii); and in LC No. 11-010105-FC of two counts of first-degree CSC, MCL 750.520b(1)(a). The trial court sentenced defendant to 5 to 15 years' imprisonment for second-degree CSC in LC No. 11-007338-FC, to consecutive terms of 25 to 75 years and 20 to 60 years' imprisonment for two counts of first-degree CSC in LC No. 11-007445-FC, and to 15 to 60 years' imprisonment for each first-degree CSC conviction in LC No. 11-010105-FC. We affirm.

In LC No. 11-007338-FC, the victim testified that when she was 14 years old, defendant rubbed her legs, pulled her pants down, and rubbed his penis up and down the outer lips of her vagina. In LC No. 11-007445-FC, the victim testified that when she was 12 years old, defendant put his penis into her vagina. She testified that when she turned 13, defendant put his mouth on her vagina. In LC No. 11-010105-FC, the victim testified that when she was less than 13 years old, defendant attempted to put his penis in her vagina and managed to put his penis "beyond the lips" and "in the crevice," but she told defendant to stop because it hurt. The victim further testified that defendant put his mouth and tongue on the outer lips of her vagina.

Defendant first challenges the sufficiency of the evidence as to all of his convictions. We review the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt, *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009),

resolving any conflicts in the evidence in favor of the prosecution, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

In LC No. 11-007338-FC, sufficient evidence was presented for a rational trier of fact to conclude that defendant committed one act of second-degree CSC against the victim. Under MCL 750.520c(1)(b)(ii), a person is guilty of second-degree CSC when he "engages in sexual contact" with a person, "[t]hat other person is at least 13 but less than 16 years of age," and "[t]he actor is related by blood or affinity to the fourth degree to the victim." The statute defines sexual contact as "the intentional touching of the victim's or actor's intimate parts . . . if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner." MCL 720.520a(q). Intimate parts include "the primary genital area." MCL 720.520a(e). "A relationship by 'blood' is defined as 'a relationship between persons arising by descent from a common ancestor' or a relationship 'by birth rather than by marriage.'" *People v Zajaczkowski*, 493 Mich 6, 13; 825 NW2d 554 (2012), quoting Black's Law Dictionary (8th ed), p 182. The victim testified that while she was 14 years old, defendant sat next to her, rubbed her legs, pulled her pants down, and rubbed his penis up and down the outer lips of her vagina for five minutes. It is undisputed that defendant was the victim's uncle. Defendant's sexual contact with the victim can "reasonably be construed as being for the purpose of sexual arousal," MCL 720.520a(q), where he rubbed his penis on the outer lips of her vagina for five minutes, and was not wearing pants. The victim's testimony alone was sufficient to establish the elements of the offense. *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998); MCL 750.520h.

In LC No. 11-007445-FC, sufficient evidence was presented for a rational trier of fact to find that the essential elements of the crime were proved beyond a reasonable doubt and that defendant committed two acts of first-degree criminal sexual conduct against the victim. Under MCL 750.520b(1)(a), a person is guilty of first-degree CSC when he "engages in sexual penetration with another person," and the "other person is under 13 years of age." A person is also guilty when the "other person is at least 13 but less than 16 years of age," and "the actor is related to the victim by blood or affinity to the fourth degree." MCL 750.520b(1)(b)(ii). The statute defines sexual penetration to include "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 720.520a(r). "[C]unnilingus requires the placing of the mouth of a person upon the external genital organs of the female which lie between the labia, or the labia itself, or the mons pubes." *People v Harris*, 158 Mich App 463, 470; 404 NW2d 779 (1987). The victim, defendant's daughter, testified that in 2009, defendant put his penis into her vagina while she was 12 years old. This testimony establishes one count of first-degree CSC. The victim further testified that defendant put his mouth on her vagina after she had turned 13 years old. This testimony established the second count of first-degree CSC under MCL 750.520b(1)(b)(ii).

In LC No. 11-010105-FC, there is sufficient evidence in the record for a rational trier of fact to find that the essential elements of two acts of first-degree CSC against the victim were proved beyond a reasonable doubt. The victim, another daughter of defendant, testified that, when she was less than 13 years of age, defendant attempted to put his penis in her vagina. The

victim told defendant to stop because it hurt when he tried to penetrate her, testified that his penis went beyond the lips and in the crevice. The victim further testified that defendant also put his mouth on the outer lips of her vagina and that "his tongue was touching my vagina." This testimony established two counts of first-degree CSC under MCL 750.520b(1)(a).

In a Standard 4 brief, defendant argues that the prosecution committed a *Brady*[1] violation by failing to disclose some letters that he wrote to one of the victims and also failed to disclose a police report mentioned by a detective at trial. Defendant bears the burden of "furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal was predicated." *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Nothing in the record establishes that the evidence was favorable to defendant, that defendant did not possess the letters or report, that defendant could not have obtained the evidence himself with any reasonable diligence, or that the prosecution suppressed the police report or letters. See *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998).

Defendant next argues in his Standard 4 brief that trial counsel was constitutionally deficient on two occasions during trial. Because defendant failed to preserve this issue, our review is limited to mistakes that are apparent on the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). To establish ineffective assistance of counsel, a "defendant must show that (1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant." *Id*. at 80-81. To establish prejudice, a defendant must overcome the strong presumption that counsel employed reasonable trial strategy and show that "but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant argues that counsel should have objected to a detective offering opinion testimony on defendant's guilt. A witness cannot express an opinion concerning the guilt of a defendant. *People v Parks*, 57 Mich App 738, 750; 226 NW2d 710 (1975). However, the detective merely testified regarding the events that led to defendant's arrest and did not express an opinion regarding the guilt of defendant. Thus, counsel's performance was not objectively unreasonable as counsel is not required to make meritless objections. *Heft*, 299 Mich App at 83.

Defendant also argues that trial counsel was objectively unreasonable for failing to cross-examine the detective. Counsel's decision regarding questioning a witness is presumed to be a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Declining to accentuate damaging testimony through cross-examination is within the wide range of reasonable strategic decisions accorded trial counsel. *Heft*, 299 Mich App at 83; see also *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). Defendant has not overcome

[1] *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

the strong presumption that counsel's performance in failing to elaborate on testimony surrounding defendant's arrest constituted sound trial strategy. *Carbin*, 463 Mich at 600.

We affirm.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens